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IN THE

Supreme Court of the United States

OCTOBER TERM, 1936

No. 469

WASHINGTON, VIRGINIA AND MARYLAND COACH COMPANY,
Petitioner,

v.

NATIONAL LABOR RELATIONS BOARD, *Respondent.*

On Petition for Writ of Certiorari to the Circuit Court of Appeals for the Fourth Circuit

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PETITION FOR WRIT OF CERTIORARI

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Lynon Printing Co., Inc., Washington, D. C.

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Comes now petitioner herein, the Washington, Virginia and Maryland Coach Company, and respectfully prays for the issuance of a writ of certiorari to review the judgment of the Circuit Court of Appeals for the Fourth Circuit herein.

Opinions Below

The findings of fact and the order of the National Labor Relations Board (R. 528-548), are not yet reported, nor the Opinion of the Circuit Court of Appeals (R. 589).

Jurisdiction

The judgment of the Circuit Court of Appeals was entered October 6, 1936 (R. 598, 599). The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial

Code as amended by the Act of February 13, 1925, and Section 10 (e) of the National Labor Relations Act.

Questions Presented

1. Whether, as applied to petitioner, a bus company admittedly operating in interstate commerce, the National Labor Relations Act is a valid exercise of the power of Congress to regulate commerce.

2. Whether the provisions of the Act herein involved violate Article 3 of the Constitution in that they improperly delegate judicial powers to the National Labor Relations Board.

3. Whether the provisions of the Act herein involved violate the Fifth Amendment in that they deprive petitioner of liberty or property without Due Process of Law.

4. Whether the provisions of the Act herein involved violate the Seventh Amendment in that they improperly deprive petitioner of the right of trial by jury.

Statute Involved

The National Labor Relations Act is already before this Court *in toto* as an Appendix to the Government's Petition in *National Labor Relations Board* v. *Jones & Laughlin Steel Corporation*, No. 419 of the present term.

STATEMENT

The National Labor Relations Board filed a Petition with the Court below for the enforcement of an order issued against petitioner directing it to cease and desist from discouraging its employees from becoming members of the Amalgamated Association of Street, Electric Railway and Motor Coach Employees of America and from interfering in any other manner with its employees in their exercise of their rights of self-organization or to join labor organizations or to bargain collectively, through representatives of their own choosing (R. 586, 548). The order also affirmatively required petitioner to offer reinstatement to the em-

ployees it had discharged, eighteen in number, with back pay to the date of their alleged wrongful discharge (R. 548). The order resulted after a hearing before the Board in which petitioner, appearing specially, participated only after objecting to the jurisdiction of the Board on Constitutional grounds, which objections were not waived (R. 26, 592). The petitioner admitted that it was engaged in interstate commerce, also the discharge of the employees, but denied that the discharge of these employees had anything to do with union activities (R. 28-37).

At the hearing, the principal evidence for the Board was that the eighteen employees in question, four of them bus drivers and the remainder mechanics and service employees engaged in repairing and servicing the busses, were discharged shortly after the formation of a local union in petitioner's organization, which theretofore had possessed no union. Each of the discharged men was a member of the union. There was testimony, denied by petitioner's officers, that about the time of a preliminary meeting the Company began to enquire of the bus drivers as to their membership in the union, suggesting that they give further consideration to the matter of becoming or remaining members. Advertisements were placed in a newspaper calling for new men to be hired. A circular mildly adverse to the formation of "cliques" and part of a set to be distributed each week was claimed by the Board to have been distributed on this particular occasion with the intention of discouraging the formation of the union. This was denied by petitioner. There was also evidence that one of the men discharged was told by an officer of the Company that the officer would never recognize the union (R. 528).

The Company's position was that almost six months prior to the discharge of the men it had observed a growing slackness and inefficiency among its employees (R. 409-410, 46, 47, 56, 57, 60); that it had made preparations for their discharge for a long period of time prior thereto; that for several months prior to any hint of union activity it had

broken in new bus drivers anticipating the discharge of some of the old ones (R. 340, 341), and that the discharge at about the time of the formation of the union was the result of the above and precipitated by certain alarming stories that had come to the ears of the Company about threats to allow a bus to run wild and to tamper with brakes (R. 50, 60-63, 69, 77-82). The President of the Company testified that it was the accumulation of difficulties which finally drove him to "clean house" about the time of the formation of the union (R. 46, 48, 56, 58, 409, 410).

The Court below on the basis of this Court's decision in *Federal Trade Commission* v. *Algoma Lumber Company*, 291 U. S. 67, 73, held that, although the testimony of the Company was not without weight, still bearing in mind the circumstances of the discharge and that all the men were union men, it could not say that there was no substantial evidence to support the Board's findings (R. 594).

The order of the Board, approved by the Court below, was not only preventive in character but required an offer of reinstatement to the eighteen employees to their former positions, with all rights and privileges previously enjoyed and also required the Company to make the said employees whole for any loss of pay suffered by reason of their discharge (R. 548, 590, 598).

Basis of Decision Below

On the above state of facts the Court below held that the decisions of this Court in *Adair* v. *United States*, 208 U. S. 161, and *Coppage* v. *Kansas*, 236 U. S. 1, cited by petitioner against the Constitutionality of the Act, were not irrelevant but that any difficulties occasioned by them seemed to have been removed by this Court's decision in *Texas and N.O.R. Co.* v. *Railway Clerks*, 281 U. S. 548, interpreting the Railway Labor Act of 1926 (R. 594-597). No mention was made by the Court below of petitioner's contentions that the Railway Labor Act of 1926 considered in the Texas case was an Act voluntary and not compulsory in character; that the

order restoring back pay in the Texas case was sustainable only upon the theory of the voluntary feature of the Act and upon the further fact that such restoration constituted a reasonable purgation of the contempt resulting from the disobedience of the Court's order in the Texas case. Nor did the Court below deal with petitioner's numerous other objections, such as that the order of restoration with back pay amounted to a mandatory injunction requiring specific performance of a personal service contract, and the further argument that the Act herein as applied to the circumstances of the particular case operated to cut down an employer's right to hire and discharge at will by thrusting the burden of proof upon the employer to prove to the satisfaction of the Labor Relations Board in Washington that a discharge of employees at or about the time of the formation of a labor union was *not* because of the formation of the union. The impairment of such right was contended by petitioner to be in violation of the Fifth Amendment.

The Court disposed of petitioner's contention that if the Act was unconstitutional as applied to intrastate commerce it was void as a whole, the intrastate regulation being inseparable from the interstate, by citing its decision rendered the same day in *Foster Brothers Manufacturing Co., Inc.* v. *National Labor Relations Board* (unreported) wherein it held that Congress never intended the Act to apply to intrastate activities. Hence the Court below held that no question of separability was presented (R. 597).

Reasons for Allowance of Writ

This Court already has before it the following allegedly *intra*-state cases arising under the National Labor Relations Act:

National Labor Relations Board v. *Jones & Laughlin Steel Company*, No. 419, this term;

National Labor Relations Board v. *Fruehauf Trailer Co.*, Nos. 420, 421, this term;

National Labor Relations Board v. *Friedman—Harry Marks Clothing Co., Inc.*, Nos. 422, 423, this term.

All the above are pending in this Court on petitions for writs of certiorari.

The Associated Press v. *National Labor Relations Board*, No. 365, this term, may be referred to as a border line case wherein there may be some question as to whether its business is purely intra-state or involves inter-state commerce.

The present case is believed to be the first case involving the National Labor Relations Act to reach this Court wherein the Act has been applied to a company admittedly engaged in *inter-state* commerce and where the order requires restoration to duty with back pay.

It would seem that it might be convenient to this Court and to the Government to have presented to it for its consideration in passing upon the Constitutionality of the Act not only allegedly *intra-state* cases, but a case like the present admittedly involving *inter-state* commerce but still assailing the Constitutionality of the Act on partly the same and additional grounds. As this Court is familiar with the various decisions cited in the Petition in *Associated Press* v. *National Labor Relations Board*, No. 365, as showing conflicts of decisions among the various Circuits on the main Constitutional questions involved, petitioner feels it unnecessary to refer to such decisions in the present Petition. Petitioner specifically argued below that if the Act herein be held to be unconstitutional with respect to *intra*-state commerce it was likewise unconstitutional as applied to the present case, the constitutional and unconstitutional provisions being inseparable. The Court below in its Opinion referred to this argument but stated that as it had by its decision in *Foster Brothers Manufacturing Co.* v. *National Labor Relations Board* (C.C.A., 4th—Oct. 6, 1936, unreported), handed down at the same time, held that

the Act was not intended by Congress to apply to so-called *intra*-state cases, no question of separability was presented. The decision below in this aspect is impliedly in conflict with the decisions of the various Circuit Courts of Appeals in

National Labor Relations Board v. *Jones & Laughlin Steel Company*, No. 419, this term;
National Labor Relations Board v. *Fruehauf Trailer Co.*, Nos. 420, 421, this term;
National Labor Relations Board v. *Friedman—Harry Marks Clothing Co., Inc.*, Nos. 422, 423, this term.

In each of the above cases the Court seems to have held, following this Court's decision in *Carter* v. *Carter Coal Co.*, 80 L. Ed. 749, that the Act herein was unconstitutional with respect to so-called *intra*-state activities. The present case, therefore, presents an additional element of conflict of decision.

The public importance of the questions involved in the present case has already been stressed in the cases in this Court above cited.

CONCLUSION

Wherefore petitioner prays for the issuance of a writ of certiorari to review the judgment below.

Respectfully submitted,

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